No. 77724-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VOTERS EDUCATION COMMITTEE *et al.*,

Plaintiffs/Appellants

v.

STATE OF WASHINGTON *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*,

Defendants/Respondents

and

DEBORAH SENN,

Intervener.

REPLY OF APPELLANTS VOTERS EDUCATION COMMITTEE *et al.* TO SUPPLEMENTAL BRIEFS OF RESPONDENTS WASHINGTON PUBLIC DISCLOSURE COMMISSION *et al.* AND INTERVENER DEBORAH SENN

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I. Under *WRTL*, VEC's ads were genuine issue advocacy.

The PDC effectively concedes, unwittingly, that VEC's ads are genuine issue advocacy under *FEC v. Wisconsin Right to Life, Inc. ("WRTL")*, 127 S. Ct. 2652, 2007 U.S. LEXIS 8515 (2007). The PDC admits that VEC's ads "arguably" share one "characteristic" with the *WRTL* ads: "The *WRTL* ads 'take a position' on an issue, *i.e.*, the senate filibuster. Arguably, the VEC ads take a position against alleged prior practices that candidate Senn engaged in while she was the State Insurance Commissioner." PDC Supp'l Br. at 4 n.4. Thus, the PDC concedes that VEC's ads *can* be interpreted as addressing an *issue*.[1] That is the end of this case. In light of *WRTL*'s holding that political speech is genuine issue advocacy "unless [it] is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate," the PDC's concession establishes conclusively that VEC's ads were genuine issue advocacy. *WRTL*, 2007 U.S. LEXIS 8515, at 47 n.7.

Wholly apart from this dispositive concession, the PDC's arguments fail for the following reasons:

1. The PDC suggests incorrectly that certain features of WRTL's

[1] The PDC's description of the issue addressed by VEC's ads is consistent with Appellants' description of it: the ethics obligations and legislative oversight of government officials, an issue raised by Senn's official conduct. But the question whether Appellants have described the issue in the same way as the PDC is irrelevant; all that matters is that a viewer could reasonably interpret the ads as pertaining to an issue.

ads—that they concerned a matter pending before the legislature and urged the viewer to contact the candidate—are *necessary* features of issue advocacy. PDC Supp'l Br. at 3-4. *WRTL* does not suggest that such features are necessary, but rather only that they are inconsistent with express advocacy. 2007 U.S. LEXIS 8515, at 40. Indeed, *WRTL* rejected the district court's express advocacy test, which looked to whether the ad described a pending or impending legislative issue and exhorted the viewer "to do anything other than contact the candidate about the described issue." 2007 U.S. LEXIS 8515, at 76 (Scalia, J., concurring). Fundamentally, VEC's ads, like WRTL's ads, were genuine issue advocacy because they expressed a position on an important policy issue and rather than urging a particular vote, they urged further investigation. *See* VEC Supp'l Br. at 5-6. Nor did VEC's ads take "a position" on Ms. Senn's "character, qualifications or fitness for office." *Id.* at 6-9.

2. *WRTL* did not "reject[] the mechanical 'magic words' test." PDC Supp'l Br. 4. Justices Scalia, Kennedy, and Thomas found that speech regulations can reach *only* magic words. 2007 U.S. LEXIS 8515, at 81-90. Chief Justice Roberts and Justice Alito approved the magic words test as a means of clarifying an otherwise vague regulation. *Id.* at 47 n.7.[2]

[2] Although the PDC attempts to portray *WRTL* as supportive of its expansive reading of *McConnell*, "seven justices of [the Supreme] Court . . . agree[d] that the opinion [of Chief Justice Roberts] effectively overrules *McConnell* without saying so." 2007 LEXIS 8515,

3. The "Jane Doe" and "Yellowtail" ads in *McConnell v. FEC* left no room for the viewer to decide what position to take vis-à-vis the candidate: "Jane Doe" "condemned" the candidate's record and "Yellowtail" highlighted the candidate's acts of domestic violence. 540 U.S. 93, 127, 193 n.78 (2003). The *WRTL* ads could be interpreted as criticizing the character of Wisconsin's senators for lacking the integrity to let the democratic process play. Yet, because the ads presented information and then left the viewer to "choose . . . to factor it into their voting decisions," the ads were deemed genuine issue advocacy. *See* 2007 U.S. LEXIS 8515, at 39-41 & n.6. VEC's ads, like the *WRTL* ads (and the *WSRP* ad), let the viewer decide how to factor in the information presented. *See* VEC Supp'l Br. at 5-9. At most, the discussion of issues in these ads merely reflected incidentally upon the candidate's character, but no court has regulated speech on such a tenuous basis.

4. The PDC misunderstands the "objective" analysis required by *WRTL*. *WRTL* requires that the Court consider only the content of the ad, not the contextual facts surrounding its airing—*that* is the sense in which the test is "objective." *WRTL*, 2007 U.S. LEXIS 8515, at 39-47. And the

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at 87 n.7 (Kennedy, J., concurring). *See also id.* at 130-31 (Souter, J., dissenting) (acknowledging that Chief Justice Roberts' decision "lays down a new test to identify a severely limited class of ads that may be constitutionally regulated as electioneering communications, a test that is flatly contrary to McConnell."); *id.* at 131 ("McConnell's holding that § 203 is facially constitutional is overruled.")

very type of contextual facts that the PDC points to were rejected in *WRTL* as "irrelevant" because they "go[] to [VEC's] subjective intent." 2007 U.S. LEXIS 8515, at 43-46. Specifically, VEC's status as a 527 organization is irrelevant since that bears, at most, on its subjective intent in airing the ads. Not all speech that is intended to influence an election is the functional equivalent of express advocacy. *See WRTL*, 2007 U.S. LEXIS 8515, at 47; *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n* ("*WSRP*"), 141 Wn.2d 245, 271-73, 4 P.3d 808 (2000). And 527s often engage in issue advocacy. *See* VEC *Amicus* Response Br. at 1-4.[3] Moreover, it does not matter whether Ms. Senn held office at the time because she was a candidate and the ads raised an issue of ongoing public concern; otherwise, an ad's status would turn on whether the ad referred to a challenger (express advocacy) or an incumbent (issue advocacy).

II. The differences between this case and *WRTL* are not material.

The PDC emphasizes that this case involves a disclosure requirement, PDC Supp'l Br. at 7-10, but even disclosure regimes must be clear and objective. *Buckley v. Valeo*, 424 U.S. 1, 79, (1976); *State ex rel. PDC v. Rains*, 87 Wn.2d 626, 630, 555 P.2d 1368 (1976). Similarly, it is

[3] The PDC also invokes the timing of VEC's ads, PDC Supp'l Br. at 7 n.6, even though *WRTL* and *WSRP* rejected that approach. 2007 U.S. LEXIS 8515, at 43-45; *WSRP*, 141 Wn.2d at 267-68.

irrelevant that the PDC seeks to impose civil fines, PDC Supp'l Br. at 10, since this Court has repeatedly voided vague speech regulations even though they provided for "only" civil remedies. *See Bare v. Gorton*, 84 Wn.2d 380, 383-87, 526 P.2d 379 (1974); *Rains*, 87 Wn.2d at 630. Here, the PDC seeks treble damages—a remedy that is surely punitive.

Finally, the First Amendment and Due Process considerations that preclude retroactive application of a speech regulation have the same force for disclosure requirements as they do for speech prohibitions.[4] In *Buckley*, the Court construed a vague speech regulation to reach express advocacy but not issue advocacy, 424 U.S. at 43, 77, 80, and this Court adopted that distinction in *WSRP*, 141 Wn.2d at 263-66. Both decisions defined express advocacy as "explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43-44 & n.52, 77, 80; 141 Wn.2d at 263-66, 268-69, 271. Because VEC's ads here lacked such words, they were issue advocacy under *Buckley* and *WSRP* when they aired. Accordingly, the PDC is bound by the "explicit words" test at least in this case, though, as shown, VEC's ads are genuine issue advocacy even under *WRTL*'s test. VEC *Amicus* Response Br. at 11-12.

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[4] The PDC misreads *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). *See* PDC Supp'l Br. at 9 n.10. The right to free speech does not entail a right of the state to compel disclosure from speakers; it entails a right of the people to prevent the state from interfering with speech. Compelled disclosure is at odds with free speech, which is why disclosure regulations must be narrowly tailored to serve a compelling interest. *See Fritz*, 83 Wn.2d at 296.

In conclusion, the Court should reverse and remand with instructions to grant VEC a summary judgment.

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